

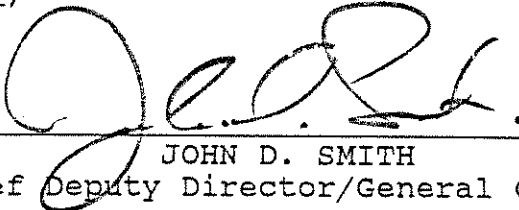
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED
IN THE OFFICE OF

In re:) 1988 OAL Determination No. 2
Request for Regulatory)
Determination filed) [Docket No. 87-008]
by Thomas C. (T.C.))
Patterson concerning the)
Department of Corrections')
"Departmental Administra-)
tive Manual," Chapter 2900)
(Polygraph Examinations);)
Section 6144 of Chapter)
6100 (Inmates' Private)
Physicians); and Chapter)
6500 (Dental Services)¹)
February 23, 1988
DEPT. OF STATE
OF CALIFORNIA
Determination Pursuant to
Government Code Section
11347.5; Title 1,
California Code of Regulations
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Cindi Rosse, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether portions of the Department of Corrections' "Departmental Administrative Manual" governing polygraph examinations, inmates' private physicians, and dental services, are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Corrections has failed to comply with the Administrative Procedure Act in establishing rules and procedures that implement, interpret, or make specific statutory, regulatory or case law. The Office of Administrative Law further concludes, however, that some of the challenged provisions of the "Departmental Administrative Manual" are either non-regulatory or are restatements of existing statutes, regulations, or case law.

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether Chapter 2900, Section 6144 of Chapter 6100, and Chapter 6500 of the Department of Corrections' ("Department") "Departmental Administrative Manual" ("Manual") are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).⁴

THE DECISION 5, 6, 7, 8

The Office of Administrative Law finds that:

- I. Portions of the "Departmental Administrative Manual" (1) are not "regulations" as defined in the Administrative Procedure Act ("APA"), and (2) are not subject to the requirements of the APA⁹ insofar as they reiterate existing statutes, regulations, or case law.¹⁰ These sections include 2901, 2904, 2905, 6144(a), 6144(c-e), 6501, 6502(a), 6502(c), 6503, 6504, 6510, 6511, 6512, 6513, 6515, 6517(e), 6519(a-d, f-i), 6520, 6521, 6522 and 6523.
- II. Certain provisions of the "Departmental Administrative Manual"¹¹ which establish rules and procedures that implement, interpret, or make specific existing statutes, regulations, or case law, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a). These sections include 2902, 2903, 6144(b), 6144(f), 6502(b), 6514, 6516, 6517(a-d), 6518, and 6519(e).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹² The Director of Corrections is charged with a "difficult and sensitive job",¹³

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein" ¹⁴

Authority ¹⁵

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁶ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.¹⁷

In 1975, the Legislature overruled a 1973 court case¹⁸ (which had found the Department exempt from the APA) by specifically providing that prison administration rules are to be adopted pursuant to the APA.

This 1975 enactment amended Penal Code section 5058, subdivision (a), which now provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. Such rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]¹⁹

General Background

The following undisputed facts and circumstances have given rise to the present Determination.

A Request for Determination was filed with OAL on May 13, 1987, by Thomas C. (T.C.) Patterson, Jr. This Request concerns the Department of Corrections' "Departmental Administrative Manual," Chapter 2900 (which deals with the

uses of, and provides the procedures for polygraph examinations), Section 6144 of Chapter 6100 (which provides the procedures for visits to inmates by private physicians), and Chapter 6500 (which states the policies and procedures for dental personnel administration, examination and treatment). The Manual is a 1,474-page document divided into sections 1 through 8,006.²⁰ The challenged sections which are at issue in this Determination are contained in 26 pages of the Manual. The Requester alleges that a substantial number of the rules contained in the Manual are "regulations" within the meaning of Government Code section 11342, subdivision (b) and that these rules have not been adopted pursuant to the APA.

On January 4, 1988, the Department filed a Response to the Request with OAL. On page 1 of this Response the Department asserted that the Manual sections in question "provide a convenient collection of applicable statutes, regulations from the California Administrative Code [now the California Code of Regulations], internal management procedures and forms."

II. DISPOSITIVE ISSUES

There are two main issues before us:²¹

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion,

bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to some of the challenged sections of the Administrative Manual, the answer to both parts of this inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²² It has been judicially held that "rules significantly affecting the male prison population" are of "general application."²³ Some of the challenged sections of the Administrative Manual are just such rules. They are rules of general application significantly affecting the prison population in the custody of the Department.

With respect to a number of the challenged sections of the Manual, however, the answer to both parts of this inquiry is "no." These sections of the Manual are either non-regulatory or are restatements of existing statutes, regulations or case law. They do not (1) establish or modify or supplement a rule of general application, or (2) implement, interpret or make specific the law enforced or administered by the Department or govern the Department's procedure.

ANALYSIS

We will discuss the challenged sections in the format used by the Department in its Response to the Request for Determination.

The Department contends that several of the challenged portions of the Administrative Manual merely repeat or paraphrase without adding anything of substance to existing statutes or regulations, and thus do not constitute exercises of quasi-legislative power by a state agency.

One example given by the Department is Manual section 6144, subdivision (c). Section 6144 sets forth the Department's policy concerning professional visits of physicians to institutions made at the request of relatives or other interested parties, for the purpose of examining and treating inmates. Section 6144, subdivision (c) states that "If permission to conduct an examination is denied, the person making the request will be notified of the right to appeal the decision by letter or telephone call to the Director." The Department correctly asserts that this section paraphrases without adding anything of substance to the appeal rights set forth in Title 15, California Code of Regulations (CCR), section 3354, subdivision (b).

We agree with the Department that those portions of the rules which repeat or paraphrase existing statutes or regulations without adding anything of substance do not constitute exercises of quasi-legislative power.

Next, the Department contends that portions of the rules are merely statements of policy, that do not alter the rights or responsibilities of the inmates or the public, and therefore fail to meet the definition of "regulation" as set forth in Government Code section 11342, subdivision (b).

One non-regulatory example cited by the Department is the second sentence of section 6144, subdivision (f) which states: "As with all situations in which more than one professional person is involved, there may be differences of opinion as to courses of treatment."

We agree, of course, that such statements do not meet the definition of "regulation" as set forth in Government Code section 11342, subdivision (b).

Several of the rules set forth in the Manual, however, are standards of general application which implement, interpret, or make specific the law enforced or administered by the Department and significantly affect the prison population.

One example of such a rule is section 6518, which states in part:

"(a) Under normal circumstances, the inmate shall have his prosthetic case completed only once. Loss, destruction, or mutilation [sic] of the denture or dentures provided by the state is solely the inmate's responsibility. Any remaking will be solely at the discretion and judgment of the chief dental officer. If he decides it is necessary to construct a second denture because of the inmate's negligence, it shall be made at the inmate's expense. If the inmate does not have sufficient funds, or is unwilling to pay for this second appliance, he shall not be furnished one at the state's expense. . . ." [Emphasis added.]

The statutes and regulations which Manual section 6518 implements, interprets or makes specific are Penal Code sections 5054, and 5058, and Title 15, CCR, section 3358.

Penal Code section 5054 states that:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Director." [Emphasis added.]

Penal Code section 5058 provides in part:

"(a) The Director may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA], and shall to the extent practical, be stated in language that is easily understood by the general public.

(b) The Director shall maintain, publish and make available to the general public, a compendium of the rules and regulations promulgated by the Director pursuant to this section. . . ." [Emphasis added.]

In addition to the statutes discussed above, Manual section 6518 also implements Title 15, CCR, section 3358, which provides that an inmate's need for artificial appliances, including dental prostheses, will be evaluated on an individual basis; that prescribed appliances will be provided at state expense if an inmate is totally without funds; and that if an inmate has funds in his or her trust account, the inmate will be charged for an appliance purchased by an inmate, through a vendor of the inmate's choice, subject to the approval of the chief medical or dental officer.

February 23, 1988

Another example of regulatory material in the Manual, which significantly affects the prison population, is section 6517, subdivision (b) which states in part that:

"In providing inmates with prosthetic service, the full denture shall be the appliance of choice when the prognosis for a partial denture is dubious. When an inmate refuses the dentist's recommendation that a full denture be inserted, the inmate shall not receive a partial denture, and shall thereafter be treated as a 'treatment refusal' case. . . ."

In addition to implementing, interpreting, and making specific the statutes and regulations mentioned above, Manual section 6517, subdivision (b) also supplements Title 15, CCR, section 3351, entitled "Refusal of Treatment," which states:

"Medical treatment, including medication, will not be forced over the objections of a mentally competent inmate, or guardian in a case of a mentally incompetent inmate, or a responsible relative in the case of a minor inmate, except when immediate action is necessary to save the life or avoid serious physical damage to an inmate."

A third example of regulatory material in the Manual is section 6144, subdivision (f), which states in part:

"As the responsibility for the treatment and care of all inmates rests with the Department, no outside professional medical person will be allowed to order treatment for an inmate It is the responsibility of the supervising medical officer to evaluate all recommendations for treatment, including those which come from outside sources, and then to determine and order the best course of treatment for the inmate in his or her care" [Emphasis added.]

The statutes and regulations which the Manual section 6144, subdivision (b) implements, interprets or makes specific are Penal Code section 5054, Penal Code section 5058, discussed above, and Title 15, CCR, section 3354, subdivision (b).

Title 15, CCR, section 3354, subdivision (b) provides in part:

"Medical personnel who are not employed by the department will not be permitted to order treatment for an inmate. However, when an

inmate or an inmate's responsible guardian or relative, or an attorney or other interested person desires to have the inmate examined by a private physician, a request shall be submitted in writing by such person or persons to the warden or superintendent. After consulting with the institution's chief medical officer, the warden or superintendent will grant the request unless there are specific case factors which, in the judgment of the warden or superintendent, warrant denial. . . ." [Emphasis added.]

It is clear that each of the above mentioned rules is a standard of general application implementing, interpreting, or making specific the law administered by the Department and that each has a significant effect on the prison population. Additional examples of regulatory provisions are discussed in note 24 to this Determination.²⁴

WE THEREFORE CONCLUDE THAT CERTAIN SECTIONS OF THE MANUAL ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to procedural requirements of the APA.²⁵

The Department contends that the remainder of the challenged rules not already discussed fall within the "internal management" exception.

The Department correctly points out that Government Code section 11342, subdivision (b), expressly states that rules relating only to the internal management of the state agency are exempt from the requirements of the APA. Many of the examples set forth by the Department are in fact examples of internal procedures. One such example is section 6522, which states that: "A daily log for each dentist in the clinic is maintained showing all dental treatments accomplished. A separate log sheet is used for each dentist each day. Listed are the patient's name, number, time of appointment and the treatment accomplished."

There is no dispute that such provisions fall within the "internal management" exception to the definition of "regulation" and are thus not required to be adopted as regulations. Additional examples of rules which relate only to the internal management of the Department are discussed in note 26.²⁶

February 23, 1988

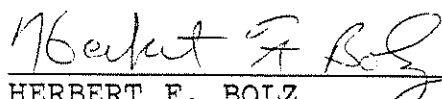
As discussed above and in note 24, however, many of the rules set forth in the Manual are standards of general application which implement, interpret or make specific the law administered by the Department, and significantly affect the prison population. These rules do not fall within the internal management exception, nor do any of the other recognized APA exceptions apply to the provisions of the Manual which have been found to be regulatory.

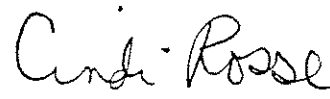
III. CONCLUSION

For the reasons set forth above, OAL finds that

- I. Certain sections of the Manual (1) are not "regulations" as defined in the APA or (2) are not subject to the requirements of the APA insofar as they reiterate existing statutes, regulations or case law. These sections include 2901, 2904, 2905, 6144(a), 6144(c-e), 6501, 6502(a), 6502(c), 6503, 6504, 6510, 6511, 6512, 6513, 6515, 6517(e), 6519(a-d, f-i), 6520, 6521, 6522, and 6523.
- II. Certain sections of the Manual which establish rules and procedures that implement, interpret, or make specific existing statutes, regulations, or case law, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5 subdivision (a). These sections include 2902, 2903, 6144(b), 6144(f), 6502(b), 6514, 6516, 6517(a-d), 6518, and 6519(e).

DATE: February 23, 1988


HERBERT F. BOLZ
Coordinating Attorney


CINDI ROSSE
Staff Counsel

Rulemaking and Regulatory
Determinations Unit

JaT:cr:dmc:\s\ldet\88.2

- 1 This Request for Determination was filed by Thomas C. (T.C.) Patterson, Jr., C-97413, Building 11-122-U, P.O. Box 4000, Vacaville, CA 95696-4000. (On December 15, 1987, OAL received notice of change of name of Thomas C. Patterson to Patrick Thomas O'Connell.) The Department of Corrections was represented by Marc Remis, Staff Counsel, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is

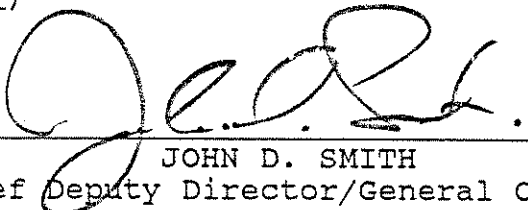
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED
IN THE OFFICE OF

In re:) 1988 OAL Determination No. 2
Request for Regulatory)
Determination filed) [Docket No. 87-008]
by Thomas C. (T.C.))
Patterson concerning the)
Department of Corrections')
"Departmental Administra-)
tive Manual," Chapter 2900)
(Polygraph Examinations);)
Section 6144 of Chapter)
6100 (Inmates' Private)
Physicians); and Chapter)
6500 (Dental Services)¹)
February 23, 1988
HAROLD SONG EU
SECRETARY OF STATE
OF CALIFORNIA

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Cindi Rosse, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether portions of the Department of Corrections' "Departmental Administrative Manual" governing polygraph examinations, inmates' private physicians, and dental services, are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Corrections has failed to comply with the Administrative Procedure Act in establishing rules and procedures that implement, interpret, or make specific statutory, regulatory or case law. The Office of Administrative Law further concludes, however, that some of the challenged provisions of the "Departmental Administrative Manual" are either non-regulatory or are restatements of existing statutes, regulations, or case law.

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether Chapter 2900, Section 6144 of Chapter 6100, and Chapter 6500 of the Department of Corrections' ("Department") "Departmental Administrative Manual" ("Manual") are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).⁴

THE DECISION 5, 6, 7, 8

The Office of Administrative Law finds that:

- I. Portions of the "Departmental Administrative Manual" (1) are not "regulations" as defined in the Administrative Procedure Act ("APA"), and (2) are not subject to the requirements of the APA⁹ insofar as they reiterate existing statutes, regulations, or case law.¹⁰ These sections include 2901, 2904, 2905, 6144(a), 6144(c-e), 6501, 6502(a), 6502(c), 6503, 6504, 6510, 6511, 6512, 6513, 6515, 6517(e), 6519(a-d, f-i), 6520, 6521, 6522 and 6523.
- II. Certain provisions of the "Departmental Administrative Manual"¹¹ which establish rules and procedures that implement, interpret, or make specific existing statutes, regulations, or case law, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5, subdivision (a). These sections include 2902, 2903, 6144(b), 6144(f), 6502(b), 6514, 6516, 6517(a-d), 6518, and 6519(e).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹² The Director of Corrections is charged with a "difficult and sensitive job",¹³

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein" ¹⁴

Authority ¹⁵

Penal Code section 5058, subdivision (a), provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁶ Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.¹⁷

In 1975, the Legislature overruled a 1973 court case¹⁸ (which had found the Department exempt from the APA) by specifically providing that prison administration rules are to be adopted pursuant to the APA.

This 1975 enactment amended Penal Code section 5058, subdivision (a), which now provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. Such rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]¹⁹

General Background

The following undisputed facts and circumstances have given rise to the present Determination.

A Request for Determination was filed with OAL on May 13, 1987, by Thomas C. (T.C.) Patterson, Jr. This Request concerns the Department of Corrections' "Departmental Administrative Manual," Chapter 2900 (which deals with the

uses of, and provides the procedures for polygraph examinations), Section 6144 of Chapter 6100 (which provides the procedures for visits to inmates by private physicians), and Chapter 6500 (which states the policies and procedures for dental personnel administration, examination and treatment). The Manual is a 1,474-page document divided into sections 1 through 8,006.²⁰ The challenged sections which are at issue in this Determination are contained in 26 pages of the Manual. The Requester alleges that a substantial number of the rules contained in the Manual are "regulations" within the meaning of Government Code section 11342, subdivision (b) and that these rules have not been adopted pursuant to the APA.

On January 4, 1988, the Department filed a Response to the Request with OAL. On page 1 of this Response the Department asserted that the Manual sections in question "provide a convenient collection of applicable statutes, regulations from the California Administrative Code [now the California Code of Regulations], internal management procedures and forms."

II. DISPOSITIVE ISSUES

There are two main issues before us:²¹

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

" . . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion,

bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to some of the challenged sections of the Administrative Manual, the answer to both parts of this inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²² It has been judicially held that "rules significantly affecting the male prison population" are of "general application."²³ Some of the challenged sections of the Administrative Manual are just such rules. They are rules of general application significantly affecting the prison population in the custody of the Department.

With respect to a number of the challenged sections of the Manual, however, the answer to both parts of this inquiry is "no." These sections of the Manual are either non-regulatory or are restatements of existing statutes, regulations or case law. They do not (1) establish or modify or supplement a rule of general application, or (2) implement, interpret or make specific the law enforced or administered by the Department or govern the Department's procedure.

February 23, 1988

ANALYSIS

We will discuss the challenged sections in the format used by the Department in its Response to the Request for Determination.

The Department contends that several of the challenged portions of the Administrative Manual merely repeat or paraphrase without adding anything of substance to existing statutes or regulations, and thus do not constitute exercises of quasi-legislative power by a state agency.

One example given by the Department is Manual section 6144, subdivision (c). Section 6144 sets forth the Department's policy concerning professional visits of physicians to institutions made at the request of relatives or other interested parties, for the purpose of examining and treating inmates. Section 6144, subdivision (c) states that "If permission to conduct an examination is denied, the person making the request will be notified of the right to appeal the decision by letter or telephone call to the Director." The Department correctly asserts that this section paraphrases without adding anything of substance to the appeal rights set forth in Title 15, California Code of Regulations (CCR), section 3354, subdivision (b).

We agree with the Department that those portions of the rules which repeat or paraphrase existing statutes or regulations without adding anything of substance do not constitute exercises of quasi-legislative power.

Next, the Department contends that portions of the rules are merely statements of policy, that do not alter the rights or responsibilities of the inmates or the public, and therefore fail to meet the definition of "regulation" as set forth in Government Code section 11342, subdivision (b).

One non-regulatory example cited by the Department is the second sentence of section 6144, subdivision (f) which states: "As with all situations in which more than one professional person is involved, there may be differences of opinion as to courses of treatment."

We agree, of course, that such statements do not meet the definition of "regulation" as set forth in Government Code section 11342, subdivision (b).

Several of the rules set forth in the Manual, however, are standards of general application which implement, interpret, or make specific the law enforced or administered by the Department and significantly affect the prison population.

One example of such a rule is section 6518, which states in part:

"(a) Under normal circumstances, the inmate shall have his prosthetic case completed only once. Loss, destruction, or mutilation [sic] of the denture or dentures provided by the state is solely the inmate's responsibility. Any remaking will be solely at the discretion and judgment of the chief dental officer. If he decides it is necessary to construct a second denture because of the inmate's negligence, it shall be made at the inmate's expense. If the inmate does not have sufficient funds, or is unwilling to pay for this second appliance, he shall not be furnished one at the state's expense. . . ." [Emphasis added.]

The statutes and regulations which Manual section 6518 implements, interprets or makes specific are Penal Code sections 5054, and 5058, and Title 15, CCR, section 3358.

Penal Code section 5054 states that:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Director." [Emphasis added.]

Penal Code section 5058 provides in part:

- "(a) The Director may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA], and shall to the extent practical, be stated in language that is easily understood by the general public.
- (b) The Director shall maintain, publish and make available to the general public, a compendium of the rules and regulations promulgated by the Director pursuant to this section. . . ." [Emphasis added.]

In addition to the statutes discussed above, Manual section 6518 also implements Title 15, CCR, section 3358, which provides that an inmate's need for artificial appliances, including dental prostheses, will be evaluated on an individual basis; that prescribed appliances will be provided at state expense if an inmate is totally without funds; and that if an inmate has funds in his or her trust account, the inmate will be charged for an appliance purchased by an inmate, through a vendor of the inmate's choice, subject to the approval of the chief medical or dental officer.

February 23, 1988

Another example of regulatory material in the Manual, which significantly affects the prison population, is section 6517, subdivision (b) which states in part that:

"In providing inmates with prosthetic service, the full denture shall be the appliance of choice when the prognosis for a partial denture is dubious. When an inmate refuses the dentist's recommendation that a full denture be inserted, the inmate shall not receive a partial denture, and shall thereafter be treated as a 'treatment refusal' case. . . ."

In addition to implementing, interpreting, and making specific the statutes and regulations mentioned above, Manual section 6517, subdivision (b) also supplements Title 15, CCR, section 3351, entitled "Refusal of Treatment," which states:

"Medical treatment, including medication, will not be forced over the objections of a mentally competent inmate, or guardian in a case of a mentally incompetent inmate, or a responsible relative in the case of a minor inmate, except when immediate action is necessary to save the life or avoid serious physical damage to an inmate."

A third example of regulatory material in the Manual is section 6144, subdivision (f), which states in part:

"As the responsibility for the treatment and care of all inmates rests with the Department, no outside professional medical person will be allowed to order treatment for an inmate It is the responsibility of the supervising medical officer to evaluate all recommendations for treatment, including those which come from outside sources, and then to determine and order the best course of treatment for the inmate in his or her care" [Emphasis added.]

The statutes and regulations which the Manual section 6144, subdivision (b) implements, interprets or makes specific are Penal Code section 5054, Penal Code section 5058, discussed above, and Title 15, CCR, section 3354, subdivision (b).

Title 15, CCR, section 3354, subdivision (b) provides in part:

"Medical personnel who are not employed by the department will not be permitted to order treatment for an inmate. However, when an

inmate or an inmate's responsible guardian or relative, or an attorney or other interested person desires to have the inmate examined by a private physician, a request shall be submitted in writing by such person or persons to the warden or superintendent. After consulting with the institution's chief medical officer, the warden or superintendent will grant the request unless there are specific case factors which, in the judgment of the warden or superintendent, warrant denial. . . ." [Emphasis added.]

It is clear that each of the above mentioned rules is a standard of general application implementing, interpreting, or making specific the law administered by the Department and that each has a significant effect on the prison population. Additional examples of regulatory provisions are discussed in note 24 to this Determination.²⁴

WE THEREFORE CONCLUDE THAT CERTAIN SECTIONS OF THE MANUAL ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to procedural requirements of the APA.²⁵

The Department contends that the remainder of the challenged rules not already discussed fall within the "internal management" exception.

The Department correctly points out that Government Code section 11342, subdivision (b), expressly states that rules relating only to the internal management of the state agency are exempt from the requirements of the APA. Many of the examples set forth by the Department are in fact examples of internal procedures. One such example is section 6522, which states that: "A daily log for each dentist in the clinic is maintained showing all dental treatments accomplished. A separate log sheet is used for each dentist each day. Listed are the patient's name, number, time of appointment and the treatment accomplished."

There is no dispute that such provisions fall within the "internal management" exception to the definition of "regulation" and are thus not required to be adopted as regulations. Additional examples of rules which relate only to the internal management of the Department are discussed in note 26.²⁶

February 23, 1988

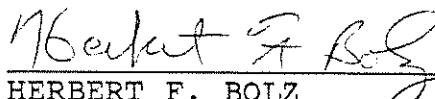
As discussed above and in note 24, however, many of the rules set forth in the Manual are standards of general application which implement, interpret or make specific the law administered by the Department, and significantly affect the prison population. These rules do not fall within the internal management exception, nor do any of the other recognized APA exceptions apply to the provisions of the Manual which have been found to be regulatory.

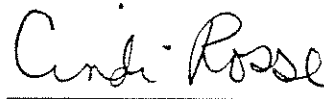
III. CONCLUSION

For the reasons set forth above, OAL finds that

- I. Certain sections of the Manual (1) are not "regulations" as defined in the APA or (2) are not subject to the requirements of the APA insofar as they reiterate existing statutes, regulations or case law. These sections include 2901, 2904, 2905, 6144(a), 6144(c-e), 6501, 6502(a), 6502(c), 6503, 6504, 6510, 6511, 6512, 6513, 6515, 6517(e), 6519(a-d, f-i), 6520, 6521, 6522, and 6523.
- II. Certain sections of the Manual which establish rules and procedures that implement, interpret, or make specific existing statutes, regulations, or case law, (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) therefore violate Government Code section 11347.5 subdivision (a). These sections include 2902, 2903, 6144(b), 6144(f), 6502(b), 6514, 6516, 6517(a-d), 6518, and 6519(e).

DATE: February 23, 1988


HERBERT F. BOLZ
Coordinating Attorney


CINDI ROSSE
Staff Counsel

Rulemaking and Regulatory
Determinations Unit

JaT:cr:dmc:\s\ldet\88.2

- 1 This Request for Determination was filed by Thomas C. (T.C.) Patterson, Jr., C-97413, Building 11-122-U, P.O. Box 4000, Vacaville, CA 95696-4000. (On December 15, 1987, OAL received notice of change of name of Thomas C. Patterson to Patrick Thomas O'Connell.) The Department of Corrections was represented by Marc Remis, Staff Counsel, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licenses's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is

invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

- 4 Government Code Section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an

administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

5 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Regulatory Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

6 No public comments were received concerning this Request for Determination. The Department submitted a Response to the Request for Determination, and it was considered in making this Determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation"

(Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on p.1.
- 9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 10 Our conclusion that portions of the Manual are not "regulations" is based not only upon a finding that some Manual provisions reiterate existing statutes, regulations, or case law, but also upon a finding that certain Manual provisions are simply "non-regulatory" in content.
- 11 See Determination, pp. 7-9 and note 24, below.
- 12 Penal Code section 5000.
- 13 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
- 14 Penal Code section 5054.
- 15 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 16 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

- 17 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.

- 18 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

As noted in 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, p. B-13; typewritten version, p. 6, Procunier was to a significant degree further overruled by Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

- 19 Section 3 of Statutes of 1975, chapter 1160, page 2876 provided:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections or the Adult Authority prior to the effective date of this

act, shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976."

- 20 Other portions of this Manual were found to be partly non-regulatory and partly regulatory in 1987 OAL Determination No. 15. (Department of Corrections, Nov. 19, 1987, Docket No. 87-004), California Administrative Notice Register, 87, No. 49-Z Dec. 4, 1987, pp. 872-900.) Two additional Requests for Determination concerning other portions of the Manual are currently pending before OAL (Docket Nos. 87-012 and 87-022).
- 21 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 22 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 23 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
- 24 Additional examples of the regulatory contents of the Manual are briefly mentioned below. Each of these provisions meets both prongs of the statutory definition of "regulation." Further, each of these provisions--except section 2902--could have a significant effect on the prison population.

Section 2902

Section 2902 provides that polygraph examinations may be administered to Department employees with the approval of the assistant director as an investigative tool in an official departmental matter when a written request is submitted by the employee, that no employee shall be compelled to submit to a polygraph examination, and that permission to polygraph an employee will "normally be granted only when the examination is to be an investigative tool in an official departmental matter, when there is a significant need to know whether an employee is telling the truth, and other investigative efforts have been exhausted."

In addition to implementing, interpreting, and making specific Penal Code sections 5054 and 5058 as set forth in the text, Manual section 2902 also implements Government Code section 3307 which states that "no public safety officer shall be compelled to submit to a polygraph examination against his [sic] will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a polygraph examination, nor shall any comment be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take a polygraph examination, nor shall any testimony or evidence be admissible at a subsequent hearing, trial, or proceeding, judicial or administrative, to the effect that the public safety officer refused to take a polygraph examination." See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609 (invalidating agency's informal rules supplementing internal tenure laws; quality of state college faculty was matter of public concern.)

Section 2903

Section 2903 provides that inmates and parolees may be tested [with a polygraph examination] with the approval of the assistant director - law enforcement liaison, as an investigative tool in an official departmental matter, and provides further that "except in unusual circumstances, polygraph examinations will not be used as substitutes for or to check on the outcome of institutional disciplinary processes or parole revocation or rescission cases."

It is a standard of general application governing the Department's procedure concerning the testing of inmates and parolees with polygraph examinations, and could have a significant effect on the prison population. Additionally, Manual section 2903 supplements the statutes mentioned above (Penal Code sections 5054 and 5058). The Manual section also implements Long Beach City Employee's Association v. City of Long Beach (1986) 41 Cal.3rd 937, 227 Cal.Rptr. 90, which held that polygraph examinations inherently intrude upon the constitutionally protected zone of individual privacy.

Section 6144(b)

Section 6144(b) sets forth when permission for a medical examination may be refused. The section states in pertinent part that:

" . . . Permission may be refused when admission of the particular professional person who would conduct the examination would be likely to create substantial stress between the

inmate and the Departmental medical staff, or when the particular professional person who would conduct the examination is considered poorly or marginally qualified to conduct an objective examination. . . . Any examination may be temporarily postponed due to an acute medical problem which would be aggravated by an examination at a particular time." [Emphasis added.]

A reading of Penal Code section 5054, Penal Code section 5058, and Title 15, CCR, section 3354 subdivision (b) reveals that the Department is implementing, interpreting, and making specific those statutory and regulatory sections in issuing Manual section 6144, subdivision (b).

Section 6502

Section 6502 sets forth the policy of the Department regarding dental services. Section 6502, subdivision (b) states in part that:

"Elaborate or extensive dentistry for one patient which cannot be provided for all should not be undertaken."

In addition to implementing, interpreting, and making specific the statutory provisions contained in Penal Code sections 5054 and 5058 as mentioned above, Manual section 6502, subdivision (b) also interprets Title 15, CCR section 3350 which states:

"The department will provide every reasonable medical, surgical and dental service for inmates, and will maintain adequate facilities and staff for such service" [Emphasis added.]

Section 6514

Section 6514 regulates what materials shall be used for dental restorative procedures. It provides that restorative materials of choice are silver, silicate, composites, stainless steel crowns, and plastic jackets, and regulates the conditions in which the chief dental officer may authorize the use of gold.

In addition to the statutes and regulations mentioned above, section 6514 also implements Title 15, CCR, section 3354, subdivision (a) which provides:

"Only personnel who are members of an institution's medical staff, or persons paid to perform medical services under contract with the institution, or persons

employed as medical consultants, shall be permitted to diagnose illness and prescribe medication and medical treatment for inmates. No other personnel nor inmate may do so, however, emergency first aid may be given in keeping with the nature and apparent seriousness of a person's illness or injury. All medical treatment will be in accordance with sound principles of practice."

All of the following examples of the regulatory contents of the Manual implement, interpret, and make specific Penal Code sections 5054, 5058, and Title 15, CCR, section 3354, subdivision (a). We note that analogous criteria for the provision of Medi-Cal dental services have been adopted pursuant to the APA by the Department of Health Services (Title 22, CCR, section 51003, subdivision (e), incorporating by reference "Manual of Criteria for Medi-Cal Authorization," (Criteria for Dental Services under the Medi-Cal Program, pp. 8.0 through 8.2.4) published by the Department of Health Services in January 1982, last amended in October, 1987.)

Section 6516

Section 6516 prohibits the provision of cast crowns or bridge work except in "those very rare instances where no other type of appliance is feasible, and there is urgent need for the replacement."

Section 6517(a)

Section 6517(a) states that prosthetic services shall be provided when approved by the chief dental officer or his delegated subordinate and defines limited prosthetics as "the provisions of economical appliances necessary for the proper mastication of food and/or the replacement of missing anterior teeth."

Section 6517(c)

Section 6517(c) restricts the usage of partial dentures to cases "where anterior teeth are to be replaced and/or the number of remaining teeth are insufficient to provide for mastication"

Section 6517(d)

Section 6517(d) sets forth the priorities for authorization of prosthetic appliances; and makes the decision of the chief dental officer final.

(Note: With regard to section 6517, subdivision (e) the Department is correct in asserting that this section merely paraphrases Business and Professions Code section

1706, which requires the labeling of dentures during their manufacture. As such, it does not constitute an exercise of quasi-legislative power by the Department and therefore does not need to be set forth in regulation).

Section 6519

Although most of section 6519 involves internal procedures for the use of forms regarding dental care, section 6519(e) is regulatory in providing that whenever a special service is necessary, it shall be paid for by the inmate, and that "special services shall not be approved whenever materials on hand can be used as a reasonable substitute for the precious metal."

- 25 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but generally do not apply to the case at hand:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory

exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225, ATSS 473-6225) is a helpful guide for locating such information.

- 26 Additional examples of rules which relate only to the internal management of the Department, and thus are not subject to the procedural requirements of the APA, are briefly mentioned below.

Section 2901

Section 2901 states which of the Department's employees may administer polygraph examinations in state prisons, and where the results should be distributed and stored.

Section 2904

Section 2904 provides that the Department's employees may perform polygraph examinations for other agencies.

Section 6503

Section 6503 concerns the dental services staff of the Department, and provides that all dental services will be under the professional supervision of the chief of dental services.

Section 6504

Section 6504 provides that the chief dental officer will be responsible for the satisfactory operation of the laboratory.

Section 6510

Section 6510 provides the internal procedures for dental examinations.

Section 6511

Section 6511 provides that when emergency treatment is accomplished at a reception center it will be recorded on certain dental forms in the treatment section.

Section 6512

Section 6512 provides for the classification of dental treatment and methods of recordkeeping.

Section 6513

Section 6513 provides that urgency of dental treatment shall be decided by the chief dental officer.

Section 6515

Section 6515 provides for instruction in oral hygiene.

Section 6520

Section 6520 describes the amount, timing, procedures and location for training of dental services employees.

Section 6521

Section 6521 specifies the personnel responsible for budgeting, ordering supplies and stock control.